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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ADELBERT EVANS,

Defendant and Appellant.

F035138

(Super. Ct. No. 42182)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Joseph A. Kalashian, Judge.

Anthony J. Dain, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert R. Anderson, Assistant Attorney General, Lloyd G. Carter and Michelle L. West, Deputy Attorneys General, for Plaintiff and Respondent.

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STATEMENT OF THE CASE

On August 9, 1999, an information was filed in Tulare County Superior Court charging appellant Adelbert Evans with count I, first degree burglary of Renee Bailey's residence (Pen. Code,[1] § 459); counts II and III, assault with a firearm on Renee Bailey and Elen Castro (§ 245, subd. (a)(2)); counts IV through VIII, terrorist threats on, respectively, Renee Bailey, Elen Castro, Brian Horner, Diana Curry, and C.M. (§ 422), and count IX, misdemeanor battery on a noncohabitating spouse, C.M. (§ 243, subd. (e)(1)). As to counts I through VI, it was further alleged that appellant personally used a firearm, a rifle, within the meaning of section 12022.5, subdivision (a)(1). Appellant pleaded not guilty and denied the special allegations.

On October 6, 1999, appellant's trial began with jury selection. On October 8, 1999, the trial court granted the prosecution's motion to dismiss count VII, and granted appellant's motion to dismiss count VI. On October 12, 1999, the court denied appellant's motion to dismiss count V.

On October 13, 1999, the jury found appellant guilty of counts I through V, and counts VIII and IX. The jury found the personal use enhancement true as to counts I through V.

On January 21, 2000, the court denied probation and imposed an aggregate term of 10 years in state prison: as to count I, the midterm of four years, with a consecutive four-year term for the personal use enhancement; as to count II, a consecutive term of one year (one-third the midterm); as to count III, a consecutive term of one year (one-third the midterm); as to counts IV, V and VIII, the midterm of two years for each count, to be served concurrently to the term imposed in count III. As to count IX, the court imposed

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

no further time. The terms imposed for the enhancements as to counts II through V were stayed pursuant to section 654.

On March 3, 2000, appellant filed a timely notice of appeal.

FACTS

Appellant Adelbert Evans and Claudette M. (identified as C.M. in the information) had lived together for 13 years. They lived with their five children in a trailer on Beacon Street in Tulare. Their trailer was enclosed with a fence and a gate, and it was adjacent to other trailers in the neighborhood. Deanna Bailey Curry and her sister, Renee Bailey, were staying in the trailer across the street. There were several other people staying at Renee's trailer, including Brian Horner, Evelyn "Kathy" Castro, and "Jimmy."[2]

On June 25, 1999, Claudette arrived home from work in the afternoon, and found appellant drinking Cisco wine. They argued about whether appellant was going to spend the night in a motel, and Claudette demanded $20 because she didn't have any money. Appellant drove away from the trailer around 11:00 p.m. Claudette and her neighbor, Deanna Curry, sat outside and Deanna had "quite a bit to drink."

Appellant returned around 12:30 a.m., and Claudette and Deanna were still in the yard. Claudette told Deanna to leave so appellant wouldn't see her. Deanna went back to Renee's trailer, and Claudette and appellant went into their own trailer.

After appellant returned, he again had an argument with Claudette. Appellant had been drinking, and repeatedly said that Claudette didn't love him. Claudette repeatedly replied that appellant didn't love himself, and asked him to leave her alone because she wanted to go to bed. Appellant grabbed Claudette and they ended up on the bed, and he wouldn't let her go. Claudette used her fingers to push down on his throat, and he finally

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[2] The information apparently misidentified Evelyn Castro as "Elen" Castro.

released his grip. Claudette testified the children were asleep and she didn't want to wake them, so she left the trailer and went outside.

Appellant followed her out of the trailer and caught her at the front gate. Claudette held onto the gate, and appellant pushed her down to her knees and said she wasn't going anywhere. Appellant repeatedly called her a bitch and said she wasn't going to leave. Claudette was afraid and screamed, "'Someone help me.'"

Deanna testified she heard the shouting and screaming, and went outside to see what was going on. Deanna told appellant to leave Claudette alone. Appellant told Deanna to "stay the fuck out of his business and to get the hell away" from them. As appellant yelled at Deanna, he became distracted and Claudette was able to get away from the gate and head across the street to Renee's trailer.

Claudette sat outside on Renee's back porch, and Deanna joined her and asked if she was all right. Claudette testified they stayed outside because they believed appellant would just go home and go to bed, and they didn't think the situation was serious. However, appellant followed them to Renee's trailer and yelled that Claudette had stolen his cigarettes and Deanna owed him money. Deanna tried to back away from appellant, and walked around the pickup truck parked by Renee's back door. Appellant continued to yell at Claudette and Deanna, and accused them of being lesbians and stealing his cigarettes. Appellant walked up to Claudette, stood face-to-face with her, and called her "a fucking whore. I was a fucking no-good-for-nothing whore." Claudette pushed appellant away from her, ran into Renee's trailer, and locked the back door. Deanna did not make it into the trailer, and remained outside. Claudette testified that Renee and the other occupants were asleep. Claudette unsuccessfully tried to wake up Renee.

As Claudette stood inside Renee's trailer, she heard appellant tell Deanna "to stay right there, that he's gonna [*sic*] go home, he's gonna get some shit and he'll be back, which I really--I don't recall exactly how he put it, but he was saying, 'I got--I'm gonna

go get something, and you just be standing here. You wait for me until I get back, and I'm gonna blow your ass away.'"

Suddenly, Claudette heard someone knocking on the back door of Renee's trailer, and it was Deanna. Appellant had left the area, and they stood on the back porch and discussed the situation. Deanna suggested they go across the street to a trailer which was empty so they wouldn't wake up Renee and the others who were already asleep in Renee's trailer. Claudette agreed and they walked to the empty trailer across the street.

After they reached the empty trailer, they observed appellant walking through the area and looking for Claudette. Appellant shouted, "'Come out, wherever you are,'" and looked inside a shed in Renee's backyard. Claudette also heard appellant say, "'Come on, bitch. It's on now. Come on bitch.'" Claudette believed that appellant wanted to hit her. Appellant was still cursing and very angry, but he didn't look in the empty trailer where they were hiding and watching him. Claudette didn't see anything in his hands.

At some point around 1:00 a.m., appellant left Renee's trailer and walked through the neighborhood. Deanna slipped out of their hiding place, and went to Renee's trailer to make sure everyone was alright. Claudette remained in the empty trailer and continued to watch the street, and saw appellant carrying something in his hands. Claudette testified that appellant held the object in his hand, down at his side, and it appeared to be a baseball bat or some type of heavy object. Appellant stood in front of Claudette's hiding place, then walked to Renee's shed while he was still holding the object.

Claudette was afraid that appellant might check the empty trailer, and she hid inside the shower so he wouldn't find her. She heard appellant walking around outside and mumbling, but couldn't hear his actual words. Claudette then heard Deanna's voice speaking to appellant. From the sound of her voice, Claudette believed Deanna had taken refuge in the pickup truck, and she was shouting at appellant through the closed windows.

Claudette testified she stayed hidden in the trailer's shower for about three hours. She eventually crawled into the living room and looked through the windows, and saw appellant walk back and forth between their residence and Renee's trailer. Claudette testified that appellant knocked on Renee's door. When no one answered, appellant kicked in the door and went inside. Claudette continued to watch as appellant walked through Renee's trailer and turned on all the lights. Claudette did not hear any voices or noise from Renee's trailer.

Kathy Castro testified that she was asleep in Renee's trailer when appellant came "through the door" with "a long gun" and demanded to know where Claudette was. Appellant walked around the trailer with the gun. Renee Bailey had also been asleep when she heard everyone yelling and screaming. Kathy shouted for her to run away because appellant had a gun and everyone was scared. Renee testified that she went into the living room and found appellant pointing a "big" gun at Kathy. Renee testified that appellant appeared to have been drinking, and asked them, "'Where's Claudette at?'" Kathy testified appellant pointed the gun at them and threatened to kill them.

Appellant was mad and repeatedly accused them of hiding Claudette. Renee testified that appellant pointed the gun at her and threatened to shoot her if she didn't tell him where Claudette was. Kathy and Renee managed to run out of their trailer and get away from him.

Renee testified that she ran down the street with Kathy, but appellant chased them. Appellant pointed the gun at Kathy, and Kathy shouted at Renee to make him stop. Appellant told Kathy to "'[b]e still,'" and turned toward Renee. Appellant pointed the gun at Renee and shouted, "'Where is she, bitch?'" Appellant told Renee, "'You know where Claudette's at. She's your best friend. You know where she's at.'" Renee replied that she had been asleep and didn't know where Claudette was. Appellant replied: "'Well, you call for her then. You call for her or I'll shoot you Black Flag dead.'" Renee

testified that she interpreted this statement as a reference to Black Flag bug killer, and became scared he would shoot her. She shouted once for Claudette but no one answered.

Claudette was still hiding in the empty trailer. She heard the occupants of Renee's trailer screaming, and heard Renee scream, "'No, Adel, no, please, no.'" Claudette heard appellant tell Renee to quit hiding Claudette and make her come out. Claudette looked outside the window and saw Renee run out of her trailer, and appellant followed with his gun. Claudette testified that appellant pointed the gun at Renee, and made her walk between their trailer and Renee's trailer and scream Claudette's name. Claudette testified that Renee got away from appellant and ran toward her own trailer.

Claudette was afraid appellant would find her, and she left the living room area and crawled into the kitchen of the trailer where she was hiding. Deanna apparently joined her in the empty trailer to hide. Claudette wanted to help Renee but Deanna wouldn't let her leave, and Claudette remained hidden in the trailer.

At some point, Deanna ran back to Renee's trailer and called the sheriff's department. Deanna was frightened because appellant was drunk, and afraid he would hurt Claudette. After Deanna called the sheriff's department, she hid underneath Renee's trailer.

Brian Horner, who had also been sleeping in Renee's trailer, heard the shouting and entered the living room. All the lights were on but no one was in the trailer. Brian walked outside and saw two people in the street, and recognized appellant and Renee. Brian testified that appellant held a gun at Renee and told her to "'[f]ind my wife.'"

Renee and Kathy were still in the street with appellant. Brian shouted at Renee and distracted appellant, and Renee and Kathy ran away in opposite directions. Renee found Deanna and joined her under the trailer to wait for the deputies to arrive. Claudette also remained in her hiding spot in the empty trailer place until the deputies arrived.

As the women were hiding, Brian watched appellant return to his own trailer residence. Brian testified that appellant seemed to unload his gun. Brian decided it was

all over, and he went back to bed in Renee's trailer. He didn't bother checking on Renee's welfare because he couldn't see her after she ran away.

However, Brian woke up again when he heard a thumping noise, and found appellant walking through the trailer again. Appellant did not have a gun. Brian testified that appellant said, "'I'm gonna kill all four of you Black Flag dead.'" Brian testified he wasn't frightened by this threat. "I mean I slept through the whole thing. I didn't know what actually was going on until it all happened." Brian described appellant's final exit from the trailer:

> "Q When you woke up the second time, other than [appellant], was anybody else inside the trailer?
>
> "A No. [Appellant] comes tumbling through the front door and went out the back door. I just went on in, shut the door to the bedroom, and went back to bed again.
>
> "Q This is rather confusing to me. Just to make sure I understand this, you're telling us that after you saw Renee run off and you saw [appellant] go to his residence, you went back to bed; is that right?
>
> "A (Witness nods head.)"

Brian testified he "just went back to the bedroom and back to bed."

When the deputies arrived, Claudette finally emerged from her hiding place to call the officers because they drove to the wrong address. When she reached the curb, she discovered appellant was directly behind her. Appellant shouted her name and briefly chased her. Claudette continued to run until she realized appellant had fled the area.

At approximately 3:00 a.m., Tulare County Sheriff's Deputy James Evans responded to the dispatch about a disturbance on Beacon Street, and made contact with Claudette and Deanna. Deputy Evans testified that Claudette appeared to be very scared. Deanna stated that appellant went into Renee's trailer with a gun. Either Claudette or Deanna stated that appellant threatened them, and they fled from the area. They were very upset because they didn't know where appellant was.

Deputy Evans also interviewed Kathy Castro and Brian Horner, and they both stated they were afraid of appellant. Deputy Evans asked each individual "if they were in fear for their lives from [appellant] from pointing the rifle at them, and they all said yes." Evans reported that "'All victims involved related that they believed [appellant] was going to kill them.'"

Deputy Evans testified all of the victims were very scared because they didn't know the whereabouts of appellant or his gun. The officers were also worried because of the victims' reports that appellant had a gun. Deputy Evans and three or four other deputies searched the entire area for both appellant and the weapon, but they couldn't find anything. Deputy Evans primarily looked in the area behind Renee's trailer, and the old chicken coops behind appellant's trailer. He was unaware if the other officers searched the areas under and behind appellant's trailer.

Later that morning, the deputies arrested appellant in the vicinity of the trailers. Claudette watched the arrest from Renee's trailer.

After appellant was arrested, Deanna and Claudette looked around the trailers for the gun which appellant had held during the confrontations. Claudette testified she found a rifle under another trailer parked on their property. The rifle was behind a toolbox. Claudette turned over the weapon to the officers.

Deputy Evans was not present when the weapon was found. He described the weapon as a two-fed automatic, .22-caliber Marlin rifle, which appeared to be operable. It was unloaded when it was turned over to the deputies. Deputy Evans conceded he never tried to trace the owner of the weapon, never checked the serial number, and never tried to lift fingerprints from it.

Additional prosecution evidence

At trial, Claudette testified the rifle she found under her trailer was consistent with the object that she saw in appellant's hands as he walked around the street. On cross-examination, Claudette admitted that she never tried to contact the other residents in the

neighborhood to ask for help. Claudette testified she was too frightened to leave her hiding place to get help from the other neighbors because appellant might find her. She didn't notice if any of the neighbors turned on their lights during the disturbance.

Also at trial, Deanna Curry admitted that she was currently in jail for violating Health and Safety Code section 11550, being under the influence of narcotics. She also admitted she had quite a bit to drink that night. Deanna denied telling an officer that appellant threatened to get his gun and kill everyone. She denied that appellant threatened her. She testified that she never saw appellant enter Renee's trailer, or that he made Renee walk around the street and shout for Claudette. However, she saw someone walking in the area with a gun, but she couldn't tell if the person was appellant because it was too dark. On cross-examination, Deanna admitted that Renee had a dog, and appellant and Claudette had dogs in their yard, but she didn't hear any dogs barking in the neighborhood during the incident. She thought the other occupants of Renee's trailer were asleep.

Evelyn "Kathy" Castro was also in jail at the time of trial, and serving a sentence for selling narcotics. Kathy testified that she couldn't remember "a whole lot" of details about the incident because she was scared. However, Kathy testified that when appellant burst into Renee's trailer, there were no lights turned on, and only the bathroom light had been left on. Kathy testified she ran to another trailer down the street and hid until the shouting stopped. She was supposed to call the police for help, but she never did.

Renee Bailey identified the rifle recovered from under the trailer as consistent with the gun that appellant held in her living room and the street.

Deputy Evans testified that when he interviewed the victims at the scene, neither Renee nor Kathy said they were both in the street with appellant. Renee did not state that appellant made her walk around the street and shout Claudette's name.

Defense evidence

Appellant's trial testimony was the only defense evidence. Appellant testified that earlier in the day, he had a discussion with Claudette about buying their oldest son a birthday gift for the following day. Appellant and Claudette were sitting together, and appellant was drinking a bottle of Cisco wine. Claudette asked him for $20 to buy cigarettes. Appellant replied he had just bought two packs of cigarettes, and asked what she really wanted the money for. Claudette replied that she was going to loan it to Deanna and Renee, and Brian would repay him within a few days. Appellant refused because he was going to use the money to buy his son's birthday gift.

Appellant testified that Claudette became angry and walked out of their trailer, and said she was going to Renee's place. Appellant followed Claudette outside, and told her to come back and talk to him. According to appellant, Claudette replied, "'I don't want to fucking talk to you.'" Deanna had come outside, and she told appellant to leave Claudette alone. Appellant told Deanna to mind her own business. Appellant told Claudette he was going to buy another bottle of wine and get a room, and he would return later for his clothes. Deanna and Claudette opened the gate, and appellant drove away in his truck. Appellant testified he never touched Deanna or Claudette during this exchange.

Appellant testified he drove to a market and purchased another bottle of Cisco wine. "And I thought to myself, I said, why should I go pay $25 or $30 for a room. I'll just go and give her the $20 and that way she won't be angry at me and I'll just go sit back at the house with the kids and watch movies." Appellant drove back to his residence and parked his truck, and carried his bottle of Cisco with him.

Appellant testified that he observed Claudette and Deanna walking from the shed in Renee's backyard. Appellant called out to Claudette but she didn't reply. Claudette and Deanna entered Renee's trailer, and appellant followed them. Appellant testified he knocked on Renee's door and called out, and Renee told him to come in. Appellant

testified that when he entered the trailer, he saw Brian Horner and Kathy Castro sitting at the table and smoking crack. Renee was standing next to them and holding a crack pipe, and Deanna was hiding behind the couch. Appellant testified he could see Claudette's shadow behind the kitchen counter, and she seemed to squat down when he entered. Appellant asked Renee where Claudette was. Renee replied that she hadn't seen Claudette. Appellant replied that he had just seen Claudette and Deanna enter the trailer. Renee swore they weren't there. Appellant told Renee that she didn't have to swear and lie to him because he saw them enter the trailer. Appellant testified that Renee continued to swear they weren't there, as Brian and Kathy continued "puffing their little stuff."

> "And I could -- I seen Deanna squatted. I was just really, you know, kind of messing with Renee to see how long she was gonna keep lying, you know, that they wasn't there."

Appellant testified he never called out for Claudette, because he decided that she would just ask for $20 and give it to them. Appellant told Renee, " . . . I know what I got to do, and I'll just go home. She got to come home sooner or later."

Appellant testified he started to walk out of Renee's place, and heard Kathy and Brian discuss the hits they were taking. Brian also said he had some more saved for later. As appellant walked out of the door, "I heard Deanna holler, 'Call the fucking cops.' So I took out running." Appellant testified he ran through Renee's backyard, past the shed, and through the adjoining cornfield. He still held the bottle of Cisco wine as he ran away. He couldn't see where he was going because the corn leaves were hitting him in the face. He fell down and hit the embankment and "knocked the wind of myself." Appellant "laid there for a long time. When I come to, I looked up and all I could see was stars. And I was catching my breath and I sit there for a long time. I don't know how long I sit there."

Appellant testified that he eventually walked back through the cornfield, toward the trailers, and noticed the sheriff's patrol cars driving around the area. He stayed at the

edge of the cornfield and watched the patrol cars until it was daybreak. He decided that the sheriff's deputies would "stop there and at daybreak, I said well, it's about time for 'em to change shifts. So I walked across the street there, walked across the field."

Appellant walked through Renee's backyard and saw three sheriff's cars drive by. He stood behind a fence until the patrol cars passed, then continued walking toward his own trailer. However, another patrol car drove by, and the deputy "looked and I looked and we looked at each other. And I started to run back, but instead of running, I said, 'Well, he gonna catch me anyway.'" Appellant went to Renee's trailer, knocked on the door, and asked for Claudette. The deputy approached appellant and placed him under arrest.

Appellant testified he never had a gun during the entire incident, but he was still holding the bottle of Cisco wine when he entered Renee's trailer. He had never seen the rifle which Claudette turned over to the deputies, and claimed he hadn't owned a gun since 1995. Appellant testified he never threatened to kill anyone that night, and only told Deanna to mind her own business when he was arguing with Claudette. He never threatened Claudette, and only asked her to come back so they could talk about whether Deanna and Renee would give him collateral for the $20 loan. He never forced Renee to walk around the street and shout for Claudette. Appellant testified that Claudette, Deanna, Renee, and the others were lying about the entire incident.

Appellant conceded he spoke with Deputy Hermosillo after he was arrested. Appellant told the officer that Claudette was angry because he refused to loan $20 to her friends, and he wanted to keep the $20 for his son's birthday gift. Appellant also said he never touched Claudette. Appellant denied making any other statements. Appellant conceded he was agitated and raised his voice when he argued with Claudette, but he wasn't yelling and screaming at her.

Appellant conceded that he didn't tell Deputy Hermosillo that he entered Renee's trailer, he didn't describe the scene inside the trailer or mention his run through the field,

or that he was knocked unconscious. Appellant explained the officer "didn't ask" about these matters, and he "just made a long story short" when he gave his statement.

Appellant testified that he ran away from the scene because he heard Deanna say they were going to call the police, and he was intoxicated. "Got scared and panics [*sic*]. Cops and alcohol do not mix." Appellant conceded he tried to hide from the deputies, and waited for their shift to change so they would leave the area. " . . . I knew if they smelled alcohol on me, they was gonna get me for public intoxication."

Rebuttal evidence

Deputy Shawn Hermosillo testified that he interviewed appellant after he was arrested. Appellant stated the entire incident occurred because he had been drinking. Appellant had been in their trailer and drinking a bottle of Cisco wine. He went into the next room to get another bottle, and Claudette stopped him and told him not to drink anymore. They also argued because appellant did not want to take Claudette and her friend to the store to buy cigarettes. Appellant said he never touched Claudette, and denied having a gun. Appellant said he left the area because he knew Claudette would call the police and have him arrested for no reason, and he did not want to go back to jail.

PROCEDURAL HISTORY

On appeal, appellant raises several contentions of ineffective assistance, and asserts the trial court should have conducted a *Marsden*[3] hearing. We will review various aspects of the procedural history which are relevant to appellant's claims.

Substitution of attorneys and the *Marsden* hearing

On July 27, 1999, the preliminary hearing was held, and appellant was represented by Jerry Sanders.

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3 *People v. Marsden* (1970) 2 Cal.3d 118.

On August 10, 1999, appellant appeared for the arraignment, and pleaded not guilty. He was represented by Don Thommen. The pretrial hearing was set for September 29, 1999, and the trial was set for October 6, 1999.

On September 29, 1999, appellant again appeared with Mr. Thommen, and the trial was confirmed for October 6.

According to the clerk's transcript, on September 30, 1999, appellant appeared for a hearing, "… RE: SUBSTITUTION OF ATTORNEY." The matter was continued to October 1 for "Further Proceedings Re: Substitution of Attorney."

Also according to the clerk's transcript, on October 1, 1999, the continued hearing was held and Mr. Thommen was "relieved as counsel," and Marcus Olmos was "substituted in as attorney of record." The trial remained set for October 6.

On October 6, 1999, appellant's trial began with jury selection. Appellant was represented by his new court-appointed counsel, Mr. Olmos. Mr. Olmos apparently requested the court to issue an order for the jail to release appellant's wallet. The court complied and issued an order for the return of appellant's wallet for purposes of trial.

In the midst of jury selection, the court excused the panel and the prosecutor, and conducted a hearing in chambers pursuant to *People v. Marsden, supra,* 2 Cal.3d 118, based upon a complaint made by appellant. The court invited appellant to state his complaint about his attorney, Mr. Olmos.

> "I don't believe [Mr. Olmos] know [*sic*] what he's doing, your Honor. He's sitting there -- to me he's discharging prospective jurors that looks good to me. He's not asking me if this guy's okay or whatever. He's leaving me no choice about it. He's just picking people that he want to pick. I don't think that's right."

Mr. Olmos replied that he dismissed one person from the panel because that person had previously served as a witness in a gang-related case. Mr. Olmos also stated that he would certainly listen to appellant's suggestions "if he has anybody he doesn't want on there."

The court found appellant stated insufficient reasons to dismiss his attorney, but advised appellant to inform Mr. Olmos of any suggestions he had during jury selection. Appellant then stated:

> "Yeah, but what I'm saying, you know, with all of these charges I'm facing, my life is on the line, you know what I'm saying? For him to sit up and just make any kind of decision like that, it upsets me, because my life is on the line here. [¶] If he's going to represent me, represent me right and give me some say so about jurors and what not. Don't just sit up and draw your own conclusions."

The court again replied that Mr. Olmos had agreed to consider appellant's suggestion, and only one person had been excused from the panel. The parties then returned to the courtroom and the court continued with jury selection.

Appellant's comments during trial

On October 7, the court completed jury selection. Mr. Olmos again raised the issue of retrieving appellant's wallet from the jail. The wallet had been seized when appellant was arrested, and he wanted some papers that were inside. However, the jail refused to release it without the requisite paperwork. The bailiff stated that he had sent the paperwork but it was rejected by the jail. The court said it would call the jail to clear up the matter.

Thereafter, appellant's jury trial commenced with the prosecution's case, and the following witnesses testified: Claudette, Deanna, Renee, Kathy, Brian, and Deputy Evans. Deputy Evans testified the officers searched the area around the trailers but could not find any weapon. Claudette testified that after the deputies left, she found the rifle under another trailer on her property.

At the conclusion of this testimony, the court excused the jury for the day, and appellant requested to address the court. Appellant stated it was very important that the other deputies who searched his property should be called to testify. Appellant also complained about his appointed counsel, Mr. Olmos.

"[He] just got my case Friday, and I sit up in the jailhouse for 50 days waiting on another court-appointed attorney who done nothing. Now he's only been on my case since last Friday. That's about seven days now. [¶] And the other two officers that searched my place, I feel that they should be here. And if they're not here to be questioned, they should be subpoenaed."

The court asked appellant what the other officers would testify about. Appellant stated:

"In regards to what they found when they searched my property. …[W]hat it shows is they didn't find the gun when they searched my property. The gun wasn't found until three hours after I was arrested. So anybody could have put the gun there. This is what I'm saying. And that's a very important issue that the jury should know too."

The court replied:

"Well, I think it's -- I think it's -- let's put it this way. There's absolutely no -- there's evidence that three officers, I think, searched the property. That's before the jury. And they weren't able to find a weapon. And then about three or four hours later the weapon was found by [Claudette]. The jury knows that."

Appellant felt that it wasn't made a point before the jury. The court replied:

"THE COURT: There's also closing argument for your attorney to emphasize that point to the jury. But I don't -- that's up to -- it's up to your attorney whether or not he wants to call these –

"[APPELLANT]: If I get a chance to testify, it's all good.

"THE COURT: Okay.

"[APPELLANT]: Whatever."

Thereafter, the court adjourned.

Appellant's motion to dismiss

On October 8, 1999, the prosecution completed its case-in-chief. Mr. Olmos moved to dismiss several of the counts against appellant, and argued the prosecution's evidence failed to establish the elements of the offenses. As to the burglary of Renee's trailer, Mr. Olmos argued the prosecution failed to show appellant entered the trailer with the specific intent to commit any felony, much less a violation of section 422 (terrorist

threats). "Even if we were to believe what some of the witnesses testified to . . . it appears that [appellant's] intent in going in was not to commit any felony, but to look for his wife, because that's what his purpose was. And he was asking everybody where is she. And then after that, if you don't know where she is, I'm going to kill you or harm you or whatever."

The prosecutor replied appellant entered Renee's trailer with a gun to find Claudette, and the circumstantial evidence established that he was going to use the gun to assault, terrorize, and threaten the occupants until Claudette was produced. Appellant believed Renee and her associates knew where Claudette was, and he took a means of force with him to compel them to disclose her whereabouts. The court agreed there was enough circumstantial evidence to send count I to the jury as to whether appellant had the requisite felonious intent when he entered the trailer.

Mr. Olmos also challenged the prosecution's evidence as to count V, terrorist threats on Kathy Castro, and argued her trial testimony showed she didn't feel appellant was going to do anything to her. Mr. Olmos argued there was insufficient evidence to establish that a reasonable person would be in a sustained fear of her own safety, as required by section 422.

Mr. Olmos raised the same challenge to count VI, terrorist threats to Brian Horner, because Brian testified that he was never threatened by appellant, with or without a rifle. While Brian testified that appellant made the "Black Flag" statements, he also testified that he didn't feel threatened by the statements.

Finally, Mr. Olmos also sought to dismiss count VIII, terrorist threats to Claudette. Claudette never testified that appellant pointed the gun at her, or threatened her with bodily injury with any type of weapon. Claudette only testified about appellant's verbal threats. "But for the most part she was away from [appellant] when all this yelling and screaming and commotion was going on with the other involved persons in this case."

The court denied appellant's motions to dismiss counts I, V and VIII. The court granted appellant's motion to dismiss count VI, terrorist threats to Brian Horner. The court also granted the prosecution's motion to dismiss count VII, terrorist threats to Kathy Castro.

After Mr. Olmos argued the dismissal motion, appellant requested to address the court:

> "THE DEFENDANT: Please, sir. On behalf of my defense, I've had totally no investigation, nobody went out and asked the neighbors have they seen anything. This seemed to me to be a one-sided investigation. That's only on behalf of the deputies.
>
> "Nobody went out and asked my neighbors. We all live pretty close there. Have they heard any of this or seen any of this. I haven't been able to go out there. I've been locked up in jail all of these for 105 days now. I feel I should have had at least somebody go out and question my neighbors to whether they seen this, because we all live in a quiet neighborhood close.
>
> "There was people living in a fifth wheel that was close to the edge of the road. The Lynch's live right next door where this parade with the gun and the witnesses all was. Nobody went out and asked those people if they seen anything.
>
> "Donna works at the pizza place. She's the manager. She gets home between twelve and one at night. Nobody went and asked these people anything. My neighbor, he's out all night also. I'm pretty sure that he was out there and he seen me when I crossed the road. He would testify probably that I didn't have a gun.
>
> "Your Honor, what I'm saying is there's been no investigation my behalf and I feel I should have that much coming at least on the interest of justice if nothing else.
>
> "THE COURT: Those are issues you could raise if there's a conviction and you feel you were not adequately represented. That's something that the appellate court would address. I can't address that now. We're in the middle of a trial?
>
> "THE DEFENDANT: It just seems everything is one-sided. In the interest of justice, that's just too much to go on without anybody hearing that.

"THE COURT: I've tried to accommodate you. We got your wallet over here. I can't call in potential witnesses for you.

"THE DEFENDANT: So what do I have to do to get this investigation I should have had? Because none of my court-appointed attorneys sent anybody out.

"THE COURT: Like I said before. That's something, if you are convicted of anything, that's something you can take up on your appeal."

Thereafter, the court adjourned for the weekend.

Closing argument

On October 12, 1999, the trial continued with Deputy Hermosillo's rebuttal testimony. The parties rested, the court preinstructed the jury, and the prosecutor gave the closing argument.

The court called a recess, and appellant requested to address the court about the contents of Mr. Olmos's closing argument. Appellant wanted Mr. Olmos "to read what I wrote from me. If he had anything after he read mine to say to the jury, then he can add whatever. But this is my life on the line and whatnot. I think what I have to say he should read to the jury. I think it should be heard by the jury."

The court explained that Mr. Olmos was responsible for conduct of the defense, and it was up to him to decide how he wanted to handle closing argument. Mr. Olmos could incorporate appellant's statement, but the court was not going to require him to read it. Appellant complained it was a violation of his rights "to put up a defense for myself."

"[APPELLANT]: I've already talked to you once, your Honor, about how I have not had nobody go out and talk to anybody in my investigation. You see what I'm saying?

"THE COURT: I understand.

"[APPELLANT]: Not a minute -- not a minute has been served out there. Nobody's went and talked to anybody about any kind of witnesses for me. It would be totally injust [*sic*] for me to sit here and let him take charge of everything."

Mr. Olmos said he hadn't looked at appellant's statement. Appellant interrupted and said he wanted Olmos to read it to the jury instead of reviewing it. Mr. Olmos would comply with appellant's request and read his statement, but he didn't know if the prosecutor would object to the contents. The court added that Mr. Olmos could also make his own closing statement. The court called a brief recess so Mr. Olmos could review appellant's statement.

After the recess, Mr. Olmos began the closing argument.

> "MR. OLMOS: Thank you, your Honor. Good morning, ladies and gentlemen. This is the part of the trial where the defense gets an opportunity to argue in front of the jury what we think the evidence shows and we come right after the District Attorney has his first crack at you.
>
> "After I finish then the District Attorney will get up again, or if he wants to can rebut anything we say.
>
> "Now, normally I would be making an argument with you trying to rebut some of the evidence what [*sic*] the District Attorney had presented to you. But we're going to sort of digress. This is somewhat unusual, I've never done before. But I'm going to be reading a statement that has been prepared by my client over here, Mr. Evans, that he would like me to read to you concerning his case."

Mr. Olmos proceeded to read appellant's statement, exactly as it had been written.

According to appellant's statement, Claudette and the others produced a scheme to convict him because he didn't do drugs, and he didn't want Claudette to be associated with her friends because they stole from him. Appellant noted Kathy Castro was an admitted drug dealer, Deanna Curry was an admitted drug user, and Renee was an heroin addict. "Jim" and Brian Horner helped them sell drugs and fence stolen goods. Appellant asserted these were not people who should be friends with his family.

Appellant pointed out there was no evidence that any dogs were barking, even though they were supposed to have been yelling and screaming at each other that night. Appellant asserted the district attorney's version of the incident never happened, and urged the jury not to let the district attorney make fools out of them. Appellant

complained the district attorney "let an admitted drug dealer off the hook with only 120 days …. Ellen [*sic*] Castro went home, right back . . . to our neighborhood." Appellant submitted Castro used "her pretty smile" to fool the district attorney that she wasn't a drug dealer.

Appellant also stated there had been no investigation in his case, even though he had been in jail for 110 days. He asserted the district attorney was a crook and withheld evidence from the jury. At this point, the prosecutor objected and the court ordered the comments stricken, then instructed Mr. Olmos to continue with appellant's statement. Appellant continued there had been no investigation, and he never had a chance to read any police reports about the incident. Appellant complained the district attorney knew he was innocent of the charges. The prosecutor again objected, and the court sustained the objection.

Mr. Olmos continued to read appellant's statement, with appellant occasionally interrupting to correct words or phrases. Appellant's statement continued with complaints about his attorney:

> "MR. OLMOS: But it is not the District Attorney's job to subpoena any of my -- anyone on my behalf. That is my attorney's job to investigate and find my witness for me. [¶] The Court has appointed me my attorney, and he has not spent one minute looking for --
>
> "[APPELLANT]: Anyone on my behalf.
>
> "MR. OLMOS: -- for any of my witnesses on my behalf. His only investigation consists of my statement and that is why I have one witness. I have had four court-appointed lawyers and I get the same results. All four of my court-appointed attorney investigations started to stop with my statement only."

As the statement continued, appellant complained the case was one-sided, his attorney wouldn't investigate for him, and all the witnesses were "dope fiends and drug dealers" who were lying. Appellant also complained Mr. Olmos didn't believe him, and Mr. Olmos had laughed in his face.

"[MR. OLMOS]: So, ladies and gentlemen of the jury, I submit to you that my attorney has been working with the District Attorney all along, ladies and gentlemen. We must send a very strong message to the District Attorney and to the court-appointed attorney that helping criminals frame innocent people is not our idea of justice.

"Ladies and gentlemen of the jury, due to the -- to these facts, you must find Mr. Adelbert Evans not guilty of all the charges. If you don't believe me, just ask them.

"Ladies and gentlemen of the jury, I am saying to you that we must send a message, especially to the District Attorney, that just because he has the home-field advantage and a few co-workers and the most --

"[APPELLANT]: -- and the most liars.

"MR. OLMOS: -- the most liars or education and a cheap suit do not make him right.

"Now, ladies and gentlemen, we can all do one or two things. That is join the District Attorney and my attorney with the criminals in helping them kill the rat, or you can set the rat free, ladies and gentlemen. I urge you on behalf of our neighborhood to let the rat live.

"You know, ladies and gentlemen, the dope dealers have a saying. They say that pay back is a mother. So, ladies and gentlemen, let's show them that pay back is a mother, by knowing in our minds and in our hearts that we are doing the right thing, just as Adelbert Evans did when he took his son next door to his neighbor's house.

"So I urge you to vote for the underdog and find Mr. Adelbert Evans not guilty on all charges and all counts. Thank you, ladies and gentlemen."

Mr. Olmos noted that he had finished reading appellant's statement, but appellant also wanted him to say that he had been in constant back pain for 23 years. The prosecutor objected and the court ordered the comment stricken. Mr. Olmos stated that was all they had. The prosecutor completed his rebuttal, the court completed the instructions, and the case went to the jury.

During deliberations, the jury requested clarification whether the enhancement required appellant's personal use of a rifle, or any other type of weapon such as a

baseball bat. The court replied the enhancement required the use of a rifle. The jury also requested to hear Claudette's testimony, specifically the portion regarding appellant's threats toward her.

On October 13, 1999, the jury returned its verdict, and found appellant guilty of count I, first degree burglary of Renee Bailey's residence; counts II and III, assault with a firearm on Renee Bailey and Evelyn "Kathy" Castro; counts IV, V, and VIII, terrorist threats to Renee Bailey, Evelyn "Kathy" Castro, and Claudette M., and count IX, misdemeanor battery on Claudette M. The jury found the personal use enhancements true as to counts I through V.

Sentencing hearing

On January 21, 2000, the sentencing hearing was held. The court inquired whether there was a motion for new trial. Mr. Olmos stated that he conducted an investigation based on information he had obtained as to how to contact certain individuals. Mr. Olmos did not believe the information was sufficient to constitute newly discovered evidence to support a motion for new trial. Mr. Olmos asked if the court wanted him to further explain his investigation, and the court invited him to continue.

Mr. Olmos had contacted two witnesses: Stephonn Smith and Pearlina Miller. Ms. Miller lived in the same trailer area, and indicated she was awakened by some noise she heard outside. She saw appellant and Claudette talking, and it didn't appear they were arguing at that time. Ms. Miller further stated she never saw appellant with a rifle, and she did not know the other people in Renee's trailer. She never saw appellant enter Renee's trailer with or without a rifle. She had no prior contact with appellant that day, and had not spoken with anyone else about the incident. Ms. Miller stated that if there had been an argument or loud noises, she would've heard something because of the dogs in the neighborhood. She didn't hear anything, and was awakened in the morning when the deputies arrested appellant.

Mr. Olmos also spoke to Mr. Smith, who was appellant's nephew. Mr. Smith was not a percipient witness, but he spoke with Claudette at the start of the instant trial. According to Mr. Smith, Claudette "made statements to him, 'They had to make sure everything was said the right way. His uncle got what he deserved and they had to get their stories to run concurrent to make sure everything was the way it was supposed to be.'" Mr. Smith initially couldn't understand why she said this, but he believed they were trying to railroad appellant.

Mr. Olmos stated that based on this information and the statutory criteria, he did not believe there was sufficient evidence to support a motion for new trial based on newly discovered evidence. Mr. Olmos did not explain how or why he contacted these individuals.

Appellant asked to address the court, and again complained he had been misrepresented by Mr. Olmos and viciously attacked by the prosecutor. He complained the county refused to turn over the transcripts from municipal court and they were hiding evidence, Mr. Olmos refused to subpoena the other three deputies who unsuccessfully searched the area for the rifle, and his first attorney, Mr. Thommen, did absolutely nothing and quit at the last minute.

The court stated these were issues appellant could raise with his appellate attorney. Appellant replied that Mr. Olmos misrepresented him, no one checked the rifle for fingerprints, and the jury was entirely composed of White people.

> "Now, you want to sit here and prosecute me and send me down the river for twelve years for something that for what? 15 years actually. For a gun that I never should have been brought in court. That's one thing.
>
> "My fingerprints was never on the gun. The gun was found three hours after I was arrested. Now, how can you sit here and say I received a just trial when the jury sits here and hear a witness and know, your Honor, that I was not -- that I'm found guilty for assaulting a man who never saw a gun, who never said anything to me, that confronted me? So how could that be a fair trial?

> "Not to mention the fact is that the place they were summoned from, Woodlake, there's one black family there. In Porterville there's four black family and none in Exeter. And all of the witnesses was white. So therefore, your Honor, based on those evidence -- on that evidence alone, with an all white jury in this county I can't possibly stand and have a fair trial.
>
> "*That should be grounds enough for retrial* or something other than just floating me down talking about an appeal when this dump truck right here ain't done his job and the other dump truck. I had four dump trucks has misrepresented me. I have to fight with this system here before anybody fights my case. This is utterly ridiculous." (Italics added.)

The court replied the jury had rendered its verdict, which would stand at this point, and again informed appellant he could raise these issues on appeal. Appellant didn't want Mr. Olmos to represent him on appeal, and the court explained that another attorney would be appointed to represent him on appeal. Appellant replied that his case should have been moved out of Tulare County from the beginning. The court instructed appellant to sit down because they were going to proceed with sentencing. Appellant stated, "Oh boy. And you call this justice?"

The court denied probation and imposed an aggregate term of 10 years in state prison. As the court imposed sentence, appellant interjected he would be too old to be on parole by the time he got out of prison. "I can't believe y'all really sit here and let them railroad me like this." The court advised appellant of his right to an appeal, and appellant again said he didn't want Mr. Olmos to represent him. The court explained that another attorney would be appointed. "I can't afford one now. I got what I paid for. I didn't have no money. I didn't get no attorney."

Issues on appeal

Appellant, represented by appointed counsel on appeal, raises several issues related to *Marsden* and ineffective assistance. He contends the trial court should have conducted a *Marsden* hearing in response to his numerous complaints about Mr. Olmos,

and also asserts Mr. Olmos's conduct of the defense was prejudicially ineffective. Appellant also raises claims of prosecutorial misconduct and sentencing error.

We will conclude the trial court's failure to conduct a *Marsden* hearing was not harmless beyond a reasonable doubt, and reverse appellant's convictions. We need not address appellant's remaining issues.

DISCUSSION

THE TRIAL COURT'S FAILURE TO CONDUCT A *MARSDEN* HEARING

Appellant contends the trial court should have conducted a *Marsden* hearing in response to his repeated complaints about Mr. Olmos's representation. Appellant asserts the court abused its discretion when it ignored his trial complaints and simply informed him of his right to raise such issues on appeal. Appellant argues his specific complaints about Mr. Olmos's failure to investigate should have triggered the court's duty to conduct a *Marsden* hearing and, at the very least, require Mr. Olmos to explain his reasons for not conducting an investigation. Appellant thus asserts the court's failure to conduct such a hearing resulted in the denial of his Sixth Amendment right to counsel.

Appellant also contends that his comments at the sentencing hearing should have been treated as a motion for new trial based on ineffective assistance. Appellant argues the trial court should have appointed a new attorney to investigate his allegations of ineffectiveness in order to file a new trial motion.

We will examine the principles behind *Marsden*, the circumstances which trigger the trial court's duty of inquiry, and whether appellant's convictions must be reversed because of the court's failure to conduct a *Marsden* hearing.

A. The Sixth Amendment right to counsel

A criminal defendant is entitled to assistance of counsel at all critical stages of the proceeding. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; Pen. Code, §§ 686, 859 & 987; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344-345.) "The right of a criminal defendant to counsel and to present a defense are among the most sacred and sensitive of

our constitutional rights. (*Magee v. Superior Court* (1973) 8 Cal.3d 949, 954.)" (*People v. Ortiz* (1990) 51 Cal.3d 975, 982.)

The court is under an absolute duty to appoint counsel to represent an indigent defendant. (*Gideon v. Wainwright, supra,* 372 U.S. 335; *People v. Marsden, supra,* 2 Cal.3d at p. 123; *People v. Stevens* (1984) 156 Cal.App.3d 1119, 1127.) However, "'[a] defendant's right to a court-appointed counsel does not include the right to require the court to appoint more than one counsel, except in a situation where the record clearly shows that the first appointed counsel is not adequately representing the accused ....'" (*People v. Marsden, supra,* 2 Cal.3d at p. 123, quoting *People v. Mitchell* (1960) 185 Cal.App.2d 507, 512.)

An indigent defendant "may be entitled to an order substituting appointed counsel if he shows that, in its absence, his Sixth Amendment right to the assistance of counsel would be denied or substantially impaired." (*People v. Berryman* (1993) 6 Cal.4th 1048, 1070, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) The defendant must demonstrate either that his appointed defense counsel is providing inadequate representation, or that he is embroiled in an irreconcilable conflict with defense counsel. (*People v. Marsden, supra,* 2 Cal.3d at pp. 124-125; *People v. Ortiz, supra,* 51 Cal.3d at p. 984.)

People v. Marsden, supra, 2 Cal.3d 118 mandates a court hearing to determine whether a defendant's appointed counsel offers constitutionally inadequate representation when defendant requests substitution of appointed counsel. The legal principles governing a *Marsden* motion are well settled. "'When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have

become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations].' (*People v. Crandell* (1988) 46 Cal.3d 833, 854; *People v. Marsden[, supra,]* 2 Cal.3d [at pp.] 124-125.)" (*People v. Fierro* (1991) 1 Cal.4th 173, 204; *People v. Hart* (1999) 20 Cal.4th 546, 603.)

The trial court is not obliged to initiate a *Marsden* inquiry sua sponte. (*People v. Leonard* (2000) 78 Cal.App.4th 776, 787.) The court's duty to conduct the inquiry arises "only when the defendant asserts directly or by implication that his counsel's performance has been so inadequate as to deny him his constitutional right to effective counsel." (*People v. Molina* (1977) 74 Cal.App.3d 544, 549; *People v. Leonard, supra,* 78 Cal.App.4th at p. 787.) The defendant is not entitled to claim that an irreconcilable conflict has arisen merely because of a disagreement with counsel over reasonable tactical decisions. (*People v. Memro* (1995) 11 Cal.4th 786, 858; *People v. Douglas* (1990) 50 Cal.3d 468, 520.) In addition, a defendant may not force the substitution of counsel by his own conduct that manufactures a conflict. (*People v. Smith* (1993) 6 Cal.4th 684, 696.) "A trial court is not required to conclude that an irreconcilable conflict exists if the defendant has not made a sustained good faith effort to work out any disagreements with counsel and has not given counsel a fair opportunity to demonstrate trustworthiness." (*People v. Crandell, supra*, 46 Cal.3d at p. 860, italics omitted.)

A defendant who makes a *Marsden* motion must show good cause for replacing appointed counsel because a defendant's right to appointed counsel does not include the right to demand appointment of more than one counsel. (*People v. Ortiz, supra,* 51 Cal.3d at p. 980, fn. 1.) In addition, substitution of appointed counsel threatens to waste public resources by creating "duplicative representation and repetitive investigation at taxpayer expense." (*People v. Ortiz, supra,* 51 Cal.3d at p. 986.) Free substitution as a matter of right would present an "undesirable opportunity to 'delay trials and otherwise embarrass effective prosecution' of crime." (*Ibid.,* quoting *People v. Williams* (1970) 2 Cal.3d 894, 906.) Denial of substitution presumably will not deprive the defendant of

effective counsel, because he or she "will continue to be represented by an attorney at public expense." (*People v. Ortiz, supra,* 51 Cal.3d at p. 986; *People v. Turner* (1992) 7 Cal.App.4th 913, 917-918.)

"[T]he right to the discharge or substitution of court-appointed counsel is not absolute, and is a matter of judicial discretion unless there is a sufficient showing that the defendant's right to the assistance of counsel would be substantially impaired if his request was denied." (*People v. Carr* (1972) 8 Cal.3d 287, 299; *People v. Clark* (1992) 3 Cal.4th 41, 104; *People v. Hart, supra*, 20 Cal.4th at p. 603.) The trial court also retains discretion to deny a *Marsden* motion as untimely. (*People v. Whitt* (1990) 51 Cal.3d 620, 659; *People v. Jackson* (1981) 121 Cal.App.3d 862, 872.) On appeal, we review a trial court's decision denying a *Marsden* motion to relieve appointed counsel under the deferential abuse of discretion standard. (*People v. Berryman, supra*, 6 Cal.4th at p. 1070; *People v. Earp* (1999) 20 Cal.4th 826, 876.)

B. <u>The court's duty of inquiry</u>

While the principles behind *Marsden* are settled, it is often difficult to determine whether a defendant's complaints about defense counsel are sufficient to trigger the trial court's duty of inquiry to conduct a *Marsden* hearing. On this point, *Marsden* explained that if a defendant seeks to have new counsel appointed due to counsel's alleged incompetence, the trial court must inquire as to the reasons for the defendant's dissatisfaction and exercise its discretion in deciding whether to replace counsel. (*People v. Marsden*, *supra*, 2 Cal.3d at p. 123; *People v. Kelley* (1997) 52 Cal.App.4th 568, 579.) The trial court's duty to permit a defendant to state his reasons for dissatisfaction with his attorney thus arises when the defendant, in some manner, moves to discharge his current counsel. (*People v. Lucky* (1988) 45 Cal.3d 259, 281.) The mere fact that there appears to be a difference of opinion between a defendant and his attorney over trial tactics does not place a court under a duty to hold a *Marsden* hearing. (*Ibid*.)

However, even if the defendant does not expressly seek to have his attorney replaced, his complaints may "plainly set forth an arguable case of the attorney's alleged incompetence, the requisite ground for replacement of counsel under *Marsden*." (*People v. Kelley, supra,* 52 Cal.App.4th at p. 580; *In re Hall* (1981) 30 Cal.3d 408, 420; *People v. Robles* (1970) 2 Cal.3d 205, 214-215.) "A trial court's duty to conduct the inquiry arises 'only when the defendant asserts directly or by implication that his counsel's performance has been so inadequate as to deny him his constitutional right to effective counsel.'" (*People v. Leonard, supra,* 78 Cal.App.4th at p. 787, italics omitted, quoting *People v. Molina, supra,* 74 Cal.App.3d at p. 549.) Thus, a defendant's complaints related to his attorney's alleged incompetence are sufficient to trigger the need for a *Marsden* hearing. (*People v. Kelley, supra,* 52 Cal.App.4th at p. 580.)

As a further matter, *Marsden* explained that "the trial court cannot thoughtfully exercise its discretion in this matter without listening to [defendant's] reasons for requesting a change of attorneys. A trial judge is unable to intelligently deal with a defendant's request for substitution of attorneys unless he is cognizant of the grounds which prompted the request. The defendant may have knowledge of conduct and events relevant to the diligence and competence of his attorney which are not apparent to the trial judge from observations within the four corners of the courtroom.... Thus, a judge who denies a motion for substitution of attorneys solely on the basis of his courtroom observations, despite a defendant's offer to relate specific instances of misconduct, abuses the exercise of his discretion to determine the competency of the attorney. A judicial decision made without giving a party an opportunity to present argument or evidence in support of his contention 'is lacking in all the attributes of a judicial determination.' [Citation.]" (*People v. Marsden, supra,* 2 Cal.3d at pp. 123-124; *People v. Leonard, supra,* 78 Cal.App.4th at p. 787.)

The court must excuse the prosecutor and, on the record, inquire into the basis for defendant's complaints, and afford him an opportunity to relate specific instances of his

attorney's inadequacy. (*People v. Hill* (1983) 148 Cal.App.3d 744, 753.) "Failure to inquire adequately into a defendant's complaints results 'in a silent record making intelligent appellate review of defendant's charges impossible.' [Citation.]" (*Id*. at p. 755; *People v. Leonard, supra,* 78 Cal.App.4th at p. 787.) Depending upon the nature of the grievances related by the defendant, it may be necessary for the court also to question his attorney. (*People v. Hill, supra,* 148 Cal.App.3d at p. 753; *People v. Young* (1981) 118 Cal.App.3d 959, 965-966; *People v. Penrod* (1980) 112 Cal.App.3d 738, 746.) "[I]nquiry into the attorney's state of mind is required only in those situations in which a satisfactory explanation for counsel's conduct or attitude toward his client is necessary in order to determine whether counsel can provide adequate representation." (*People v. Penrod, supra*, 112 Cal.App.3d at p. 747; *People v. Young, supra,* 118 Cal.App.3d at p. 966; *People v. Hill, supra,* 148 Cal.App.3d at pp. 753-754.)

In the instant case, appellant never expressly requested to discharge Mr. Olmos. However, he repeatedly complained during trial that Mr. Olmos had failed to investigate his case. In particular, appellant's statements on October 8, 1999, after the prosecution rested its case, should have triggered the trial court's duty to conduct a *Marsden* hearing. The prosecution witnesses testified that appellant walked around the neighborhood while brandishing a gun and shouting for Claudette. They further described appellant's conduct in kicking down the door of Renee's trailer, then chasing Renee into the street and making her shout for Claudette. The prosecution's theory of the case thus placed appellant in the middle of the street, walking around with a gun and shouting threats to Claudette, Renee, and the others in the middle of the night.

Appellant did not raise vague complaints about counsel's conduct of the case, challenge his tactical decisions, or assert there was an irreconcilable conflict between them. Instead, appellant specifically stated that Mr. Olmos never interviewed any of his neighbors about whether they saw or heard anything that night. Appellant specifically identified the Lynch family, who apparently lived next door, and another neighbor who

would have arrived home around 1:00 a.m. Appellant conceded he argued with Claudette that night, but insisted that he never brandished a gun or burst into Renee's trailer. Appellant's complaints thus directly addressed defense counsel's competence, were consistent with the nature of the prosecution's evidence, and represented his attempt to raise a defense that directly challenged the prosecution's theory that appellant walked around the neighborhood with a gun and shouted threats at Claudette and Renee. In addition, appellant raised these complaints after the prosecution rested its case, when it was apparent that he would be the only defense witness. There is nothing in the record to indicate that appellant was attempting to delay or frustrate the course of the trial. His statements were specifically addressed to the investigation and presentation of the defense case.

The nature and circumstances of appellant's complaints "plainly set forth an arguable case of the attorney's alleged incompetence, the requisite ground for replacement of counsel under *Marsden*." (*People v. Kelley, supra,* 52 Cal.App.4th at p. 580.) While the trial court never conducted a formal *Marsden* hearing, it allowed appellant to repeatedly express his frustration and concerns about his defense. However, the nature of appellant's complaints should have compelled the court to excuse the prosecutor and ask Mr. Olmos to respond to these issues. (See *People v. Hill, supra,* 148 Cal.App.3d at p. 753.) The court could have easily resolved appellant's allegations by asking counsel whether he had conducted any investigation into the case, contacted any neighbors, and/or determined that any evidence would be beneficial or detrimental to the defense. Instead, the court admonished appellant that it could not address these concerns because "[w]e're in the middle of a trial," and advised him to raise these issues if he was convicted and filed an appeal.

We are thus faced with a situation in which the trial court committed error by failing to conduct a *Marsden* hearing in response to appellant's specific complaints about counsel's ineffectiveness, and failing to ask counsel about the alleged absence of an

investigation. The court's failure to inquire adequately into these issues has resulted "in a silent record making intelligent appellate review of [appellant's] charges impossible." (*People v. Cruz* (1978) 83 Cal.App.3d 308, 318; *People v. Hill, supra,* 148 Cal.App.3d at p. 755.) *Marsden* error has sometimes been treated as prejudicial per se, since the very nature of the error precludes meaningful appellate review of its prejudicial impact. (*People v. Marsden*, supra, 2 Cal.3d at p. 126; *People v. Hill, supra,* 148 Cal.App.3d at p. 755.) However, a trial court's erroneous failure to conduct a *Marsden* hearing may be found harmless beyond a reasonable doubt based on the entirety of the record. (*People v. Chavez* (1980) 26 Cal.3d 334, 348-349; *People v. Marsden, supra,* 2 Cal.3d at p. 126; *People v. Leonard, supra,* 78 Cal.App.4th at p. 787.)

We must review the remainder of the record to determine whether the trial court's failure to conduct the *Marsden* hearing, in response to appellant's complaints after the prosecution rested its case, was harmless beyond a reasonable doubt.

C. <u>The sentencing hearing</u>

Defense counsel's statements at the sentencing hearing raise additional concerns in this case. Appellant's trial testimony was the only evidence presented by the defense. At the sentencing hearing, Mr. Olmos disclosed the results of an investigation he apparently conducted *after* appellant was convicted. As a result of this belated investigation, Mr. Olmos spoke to one of appellant's neighbors, who stated that she only saw appellant and Claudette talking that night, she never saw appellant with a gun, and she would have heard an argument or loud noises. Mr. Olmos also spoke to appellant's nephew, who attributed statements to Claudette concerning her intent to make sure everything was said the right way and everyone had their stories straight for trial, and that appellant got what he deserved.

Mr. Olmos did not offer any explanations as to why he waited until after the conviction to conduct this investigation or interview these witnesses. Mr. Olmos did not state that it was impossible to locate these individuals prior to the verdict, or that

appellant's neighbors would not cooperate with the defense. Instead, Mr. Olmos simply placed these statements on the record, and stated his belief that such evidence was insufficient to support a motion for new trial.

Appellant again addressed the court and expressed his frustration with defense counsel's failure to investigate his case. In light of appellant's earlier complaints, and the failure of defense counsel to present any evidence aside from appellant's testimony, the court should have asked Mr. Olmos for further information as to the reason he waited until after the verdict to conduct this limited investigation. Instead, the court again admonished appellant that the jury had returned its verdict and he could raise these issues on appeal. Appellant was concerned that Mr. Olmos would represent him on appeal, and the court assured him that another attorney would be appointed to represent him at that stage.

"When, after trial, a defendant asks the trial court to appoint new counsel to prepare and present a motion for new trial on the ground of ineffective assistance of counsel, the court must conduct a hearing to explore the reasons underlying the request. [Citations.] If the claim of inadequacy relates to courtroom events that the trial court observed, the court will generally be able to resolve the new trial motion without appointing new counsel for the defendant. [Citation.] If, on the other hand, the defendant's claim of inadequacy relates to matters that occurred outside the courtroom, and the defendant makes a 'colorable claim' of inadequacy of counsel, then the trial court may, in its discretion, appoint new counsel to assist the defendant in moving for a new trial. [Citations.]" (*People v. Diaz* (1992) 3 Cal.4th 495, 573-574; *People v. Bolin* (1998) 18 Cal.4th 297, 346.)

Appellant's complaints, at the very least, should have triggered the court's duty of inquiry into counsel's failure to conduct an investigation during the course of trial. In light of appellant's earlier complaints, the neighbor's statements to counsel are significant because counsel's belated investigation showed that at least one of appellant's neighbors

didn't hear anything that would have been consistent with the prosecution's evidence. The court's failure to conduct the earlier inquiry left it without sufficient information as to the reason counsel failed to conduct an investigation prior to the verdict. While appellant never formally made a motion for new trial, his repeated complaints again raised the issue of ineffective assistance, and the court should have conducted a *Marsden* inquiry or appointed new counsel to determine the merits of a motion for new trial based on appellant's allegations of ineffectiveness.

D. Prejudice

We are faced with two aspects of error in this case. First, the trial court should have conducted a *Marsden* hearing in response to appellant's complaints about counsel's complete failure to conduct an investigation, which were made after the prosecution rested its case. Second, in light of defense counsel's failure to present any evidence aside from appellant's testimony, the court should have responded to appellant's renewed complaints and inquired further into counsel's failure to conduct any investigation until after the jury returned its verdict.

As discussed above, the trial court's erroneous failure to conduct a *Marsden* hearing may be harmless beyond a reasonable doubt. (*People v. Chavez, supra,* 26 Cal.3d at pp. 348-349; *People v. Marsden, supra*, 2 Cal.3d at p. 126; *People v. Leonard, supra*, 78 Cal.App.4th at p. 787.) For example, in *People v. Leonard, supra,* 78 Cal.App.4th 776, defendant initially complained about his attorney on the first day of trial, but the court failed to conduct a *Marsden* hearing. *Leonard* found the error was harmless because the court conducted an exhaustive *Marsden* hearing later in the trial, in which the court properly considered defendant's complaints and the defense attorney's explanations about their conflicts. (*Id.* at pp. 787-788.)

In *Leonard*, the court's failure to initially conduct a *Marsden* hearing was harmless because a proper *Marsden* hearing was subsequently held later in trial. The same cannot be said in the instant case. Our review of the record herein revealed that one

Marsden hearing was actually held in this case, but it occurred on October 6, 1999, during jury selection on the first day of trial. On appeal, neither party noticed that a *Marsden* hearing had actually been held in this case, and on this court's own motion, we ordered the preparation of the *Marsden* transcript to determine whether the court examined appellant's concerns about his attorney on the first day of trial. Unlike *Leonard*, however, appellant's complaints at the *Marsden* hearing were solely based on Mr. Olmos's conduct of voir dire and his exercise of peremptory challenges. Appellant did not raise any issues regarding Mr. Olmos's alleged failure to investigate or interview defense witnesses. Thus, the earlier *Marsden* hearing about jury selection did not remedy the trial court's complete failure to address appellant's repeated complaints about counsel's failure to investigate his case.

In lieu of the complete reversal of appellant's convictions for a new trial, an alternate remedy could be to remand the matter to the trial court to hold a hearing to comply with *Marsden*'s dictates. (*People v. Kelley, supra,* 52 Cal.App.4th at p. 580.) In such a situation, "[t]he appropriate course of action is to remand to the trial court to allow it to fully inquire into appellant's allegations concerning counsel's performance. Following the inquiry, if the trial court determines that defendant has presented a colorable claim of ineffective assistance, then the court must appoint new counsel to fully investigate and present the motion for new trial. If, on the other hand, the inquiry does not disclose a colorable claim, the motion for new trial may be denied and the judgment reinstated. [Citation.]" (*People v. Winbush* (1988) 205 Cal.App.3d 987, 992; *People v. Ivans* (1992) 2 Cal.App.4th 1654, 1667.)

The problem in this case is that Mr. Olmos's statements at the sentencing hearing almost beg the question as to whether he actually conducted any investigation. Mr. Olmos essentially admitted that he had not investigated the case prior to the jury's return of the verdict. His abbreviated and delayed investigation produced at least one neighbor who would have undermined the testimony of the prosecution's witnesses about the

events of that night. Mr. Olmos never indicated that he was unable to find any other witnesses, or that these were the only two people who were willing to cooperate with the defense.

There is nothing in the instant record which indicated that appellant was trying to delay or frustrate the proceedings. There is no evidence of any outbursts or threats by appellant to disrupt the trial. Instead, we are presented with a silent record in which appellant's numerous complaints about the lack of an investigation are left unresolved and the trial court's only response was to admonish appellant to wait until his appeal for these issues to be addressed.

While the prosecution's case against appellant was very strong, it is impossible to determine the outcome if Mr. Olmos had conducted an investigation prior to trial and presented the testimony of at least one neighbor who would have rebutted the prosecution's theory of the case. We thus return to the source of the problems in this case: the trial court's failure to conduct a *Marsden* hearing and invite defense counsel to respond to appellant's allegations. "Failure to inquire adequately into a defendant's complaints results 'in a silent record making intelligent appellate review of defendant's charges impossible.' [Citation.]" (*People v. Hill, supra,* 148 Cal.App.3d at p. 755; *People v. Leonard, supra,* 78 Cal.App.4th at p. 787.)

We therefore conclude the trial court's failure to conduct a *Marsden* hearing was not harmless beyond a reasonable doubt. Appellant's convictions must be reversed. Given our resolution of the *Marsden* issue, we need not address appellant's remaining appellate contentions.

DISPOSITION

The judgment is reversed.

_____
Harris, Acting P.J.

WE CONCUR:

_____
Buckley, J.

_____
Levy, J.